No. 97-42 (4)

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1997

EASTERN ENTERPRISES,

Petitioner,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY, ET AL.,

Respondents,

v.

PEABODY HOLDING COMPANY, INC.,
EASTERN ASSOCIATED COAL CORP., AND
COAL PROPERTIES CORP.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONDENTS BRIEF IN OPPOSITION PEABODY HOLDING COMPANY, INC. EASTERN ASSOCIATED COAL CORP. COAL PROPERTIES CORP.

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21 pp

QUESTIONS PRESENTED

1. Whether the Coal Act explicitly requires the assignment of the beneficiaries in question to Eastern Enterprises.

2. Whether the Social Security Administration's ("SSA") assignments to Eastern Enterprises are mandated by the language of the Coal Act or are based upon the SSA's permissible construction of the statute.

3. Whether the Coal Act violates the Due Process Clause as applied to Eastern Enterprises.

4. Whether the Coal Act violated the Takings Clause as applied to Eastern Enterprises.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents, Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp., state that an ultimate parent corporation, The Energy Group, PLC, is the only parent, subsidiary (except wholly-owned subsidiaries), and affiliate that has issued shares to the public (traded on the London and New York Stock Exchanges).

LIST OF PARTIES

The Plaintiff to the proceedings below was the Petitioner, Eastern Enterprises. The Defendants to the proceedings below were the Respondents Shirley S. Chater in her capacity as Commissioner of the Social Security Administration, the United Mine Workers of America Combined Benefit Fund, and the Trustee of the United Mine Workers of America Combined Benefit Fund. The Third-Party Defendants to the action below were the Respondents Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp.

TABLE OF CONTENTS

Questions presented i

Rule 29.6 listing ii

List of parties ii

Statement of the case 2

A. The judgment under appeal involves Coal Act beneficiaries who had no employment relationship with the Peabody respondents 2

B. Eastern never severed its ties to the Coal Industry when it established EACC; instead it reaped millions of dollars in profits through its ownership interest in EACC 5

C. There is no evidence that EACC was to assume all of Eastern's Coal related liabilities 6

D. EACC has been assigned its own retirees and beneficiaries 8

E. Other Coal Act decisions 9

Reasons for denying the writ 10

I. The First Circuit correctly determined that Eastern misconstrues the Coal Act when it claims that it is unfairly burdened by the act 10

Conclusion 15

TABLE OF AUTHORITIES

CASES:

Blue Diamond Coal Co. v. Secretary of Health and Human Services (In re Blue Diamond Coal Co.), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997) 9

Carbon Fuel Company v. USX Corporation, 100 F.3d 1124 (4th Cir. 1996) 13, 14, 15

Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996) 9

Eastern v. Chater, et al., 110 F.3d 150 (1st Cir. 1997) *passim*

Holland v. Keenan Trucking Co., (S.D. W.Va., slip op., March 14, 1995), at 5, *citing* 138 Cong. Rec. at S17603 (daily ed. Oct. 8, 1992) 13

In re: Blue Diamond Coal Co., (Blue Diamond Coal Co. v. Shalala), 174 B.R. 722 (E.D. Tenn. 1994) 13

LTV Steel Co. v. Shalala (In re Chateaugay Corp.), 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995) 9

Passamaquoddy Tribe v. State of Me., 75 F.3d 784 (1st Cir. 1996) 12

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L.Ed.2d 752 (1976)..... 15

STATUTES

United States Code

26 U.S.C. §§ 9701-22 ..... *passim*

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The Respondents Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp., respectfully request that this Court deny Eastern Enterprises' petition for writ of certiorari, seeking review of the judgment and opinion

of the United States Court of Appeals for the First Circuit, entered on April 7, 1997. That opinion is reported at 110 F.3d 150 (1st Cir. 1997) (reprinted, along with the Judgment and Orders of the District Court, in the Appendix of Eastern's Petition for a Writ of Certiorari).

STATEMENT OF THE CASE

Respondents and Third-Party Defendants, Peabody Holding Company, Inc. ("Peabody"), Eastern Associated Coal Corp. ("EACC") and Coal Properties Corp. ("CPC") (collectively the "Peabody Respondents"), find the Statement of the Case as presented by Eastern Enterprises ("Eastern") in its Petition For A Writ Of Certiorari, dated July 7, 1997 ("Petition of Eastern"), notable for the manner in which it obscures the relationship between Eastern and the miners assigned to Eastern under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 ("Coal Act"). Eastern's presentation of the facts thus obscures the underlying facts of the case and misconstrues the liabilities that Eastern is challenging.

A. *The Judgment Under Appeal Involves Coal Act Beneficiaries Who Had No Employment Relationship With The Peabody Respondents.*

There are a number of allegations made in Eastern's Statement of the Case which omit crucial facts with respect to Eastern's relationship to the Peabody Respondents and to the retirees for whom it was assigned responsibility under the Coal Act. Eastern neglects to note the fact that the judgment and opinion of the United States Court of Appeals for the First

Circuit that it challenges here, actually involves the assignment under the Coal Act of two beneficiaries: the late Samuel East, who worked for Eastern for a significant period of time until 1960, and never worked for EACC or any of the Peabody Respondents; and his widow, Josephine East. *See Eastern* v. *Chater, et al.*, 110 F.3d 150, 154 (1st Cir. 1997) (reprinted in the Appendix of the *Petition of Eastern* at A-1, pp. A-6 to A-7). A request for judicial review ensued, in which Eastern asked the lower court to assign responsibility for the Easts to EACC, despite the complete lack of any employment relationship with EACC.[1] *Id.*

The First Circuit noted that Mr. East mined coal for Eastern for 14 years, from 1946 to 1960, and that he then worked for two other companies from 1960 to 1967, retiring in early 1967. *Eastern* v. *Chater, et al.*, 110 F.3d at 154; Petition of Eastern at A-6; JA 2111-2112 at ¶¶ 2, 4 and 6.[2] Thus, according to the First Circuit, for 14 of his 21 years as a miner, Eastern benefited from the work of Mr. East. For many of those years, Eastern contributed to the welfare and retirement funds of the United Mine Workers of America ("UMWA Funds"), and Mr. East and his beneficiary, Josephine East, received benefits from those UMWA Funds. While there may not have been a legal requirement to do so, during those same years, miners such as Mr. East received benefits for life from the UMWA Funds. From the time of his retirement until his death, Mr. East received benefits from the UMWA Funds, even though Eastern stopped contributing to the UMWA Funds in the mid-1960s and even though the other companies Mr. East worked for (C.C. & L. Coal Co. which became

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[1] The First Circuit notes that the Easts are a test case; that the SSA intends to assign approximately 1400 similarly situated miners and beneficiaries to Eastern. *Eastern v. Chater, et al.*, 110 F.3d at 154 n.3; *Petition of Eastern* at A-7, n.3.

[2] The joint record appendix from the United States Court of Appeals for the First Circuit is referred to as "JA."

Calvert Coal Co.) went out of business and ceased contributions in 1977. JA 2112 at ¶¶ 4 and 7. Mrs. East continues to obtain benefits from the Combined Fund. JA 2112 at ¶ 8.

Mr. East was never employed by a signatory to the 1978 (or any more recent) National Bituminous Coal Wage Agreement ("NBCWA"). *Eastern* v. *Chater, et al.*, 110 F.3d at 154; *Petition of Eastern* at A-6. "Thus, because Eastern was the [signatory operator] which had employed East for the longest period of time, the [Social Security Administration] assigned him and his wife to Eastern pursuant to Coal Act § 9706(a)(3)." *Eastern* v. *Chater, et al.*, 110 F.3d at 154; *Petition of Eastern* at A-6.

Mr. East never worked for EACC. *Eastern* v. *Chater, et al.*, 110 F.3d at 158 n.5; *Petition of Eastern* at A-16, n.5; JA 2112 at ¶ 5. In fact, Mr. East had stopped working for Eastern before EACC was even established and had retired entirely from the industry shortly after a transfer of coal industry assets to EACC by Eastern was completed as of 1966. Hence, no contributions to the UMWA Funds were made by EACC with respect to any work performed by Mr. East and EACC obtained no benefits from any such work.

Thus, a crucial distinction, and one that Eastern glosses over in its Petition, is that, in reaching its decision, the Court below rested its judgment upon the fact that the beneficiaries Eastern was challenging had become beneficiaries under the Coal Act because of an extensive employment relationship with Eastern; an employment history which never included EACC or any of the other Peabody Respondents.

B. *Eastern Did Not Sever Its Ties To The Coal Industry When It Established EACC; Instead It Reaped Millions Of Dollars In Profits Through Its Ownership Interest In EACC.*

Eastern also attempts to portray itself as having no connection to the coal industry after the completion of the transfer in 1966. *Petition of Eastern* at 6-7. But just as Eastern reaped a financial reward from decades of labor by miners such as Mr. East, so too did Eastern continue to profit, directly and indirectly, from coal mining during the 1960s, 1970s and 1980s through its ownership interest in EACC. Based on only a partial review of EACC's financial statements,[3] between 1966 and 1986 Eastern extracted over $76 million from EACC in the form of dividends and management fees. Beginning in 1966, EACC paid the following dividends to Eastern: 1970, $1,474,695; 1971, $16,000,000; 1972, $20,000,000; 1976, $7,000,000; and 1977, $1,500,000. JA 357, 397, 439, and 496. Similarly, in that period Eastern caused EACC to pay it the following fees: 1966, $261,940; 1971, $846,272; 1972, $926,000; 1977, $2,141,000; and 1978, $2,271,000. JA 278, 389, 432, 489, and 542. Additional financial statements of EACC show that in 1986, EACC paid $24,162,854 in dividends to Coal Properties Corp., which in turn paid $33,195,159 in dividends to Eastern. JA 2188 and 2191.

Clearly, Eastern seeks to convey the impression that by establishing EACC, Eastern severed its ties to the coal industry by 1966. However, Eastern neglects to acknowledge that not only was EACC controlled and managed by Eastern, but that Eastern profited by EACC's coal mining activities. In all, as the

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[3] Because discovery is still on-going in the third party action, the Peabody Respondents have only reviewed EACC's financial statements for about one-half of the twenty years in question.

First Circuit recognized, "for all the protestations of independence which Eastern makes on EACC's behalf, the fact remains that EACC returned tens of millions of dollars in dividends to Eastern during the post-1966 period." *Eastern* v. *Chater, et al.*, 110 F.3d at 158; *Petition of Eastern* at A-15.

C. *There Is No Evidence That EACC Was To Assume All Of Eastern's Coal Related Liabilities.*

As Eastern acknowledges, from 1946 to 1965, Eastern's Coal Division operated mines, primarily in West Virginia and Pennsylvania. *Petition of Eastern* at 5. In 1963, Eastern incorporated EACC and began to transfer coal assets to EACC. *Id.* at 6. By 1966, Eastern had transferred certain assets of its Coal Division to EACC. *Id.* Eastern claims that EACC assumed all of Eastern's coal-related liabilities, "known and unknown." *Petition of Eastern* at 6. But nowhere in Eastern's Petition or in its voluminous papers submitted to the lower courts is there any evidence of an express agreement on the part of EACC to assume all of Eastern's Coal Division liabilities, known and unknown, let alone the Coal Act liability. In particular, there is no evidence of any written or other agreement made at the time of the transfer of assets from Eastern to EACC whereby EACC agreed to assume from Eastern: (a) liabilities under laws not enacted at the time of the transfer of assets to EACC; (b) unforeseeable liabilities; (c) liabilities not in existence at the time of the asset transfer to EACC; or (d) any statutorily created liabilities, such as those imposed by the Coal Act, for lifetime health benefits for retirees and their dependents. JA 2116 at ¶ 21.

The Stock Exchange Agreement of 1987, pursuant to which Peabody purchased EACC and CPC from Eastern, conclusively shows that EACC had never assumed Eastern's liabilities under

the Coal Act for miners who had never worked for EACC. *See* JA 2206, *et seq*. The Stock Exchange Agreement is explicit as to the liabilities of Eastern for which CPC and EACC were liable. It expressly states that: "CPC, EACC or the other Subsidiaries of CPC shall be liable, in respect of the class of individuals hereinafter specified, for payments of premiums and benefits, and for the reimbursement of benefit costs, under the plans listed on Schedule 5(c) hereto." JA 2260. The class of individuals specified consisted of persons who had "retired or otherwise ceased to be employed by CPC or any of its Subsidiaries (including EACC)." JA 2116 at ¶ 22. This class of individuals did not include Eastern retirees who had never worked for CPC or EACC. Schedule 5(c) also makes reference only to a "Benefit Plan for UMWA Represented Employees of EACC and Subs" — not for Eastern employees who had never worked for EACC. *See* Schedule 5(c) to the Stock Exchange Agreement. JA 2116 at ¶ 22.

Eastern claims that EACC is the successor to Eastern's Coal Division and should be deemed to have assumed the liabilities of its Coal Division under the Coal Act. *Petition of Eastern* at 6-7. Even if EACC was a "successor" for some purposes, the assignment by the Social Security Administration to Eastern under the Coal Act was found by the First Circuit to be, nevertheless, correct. *Eastern* v. *Chater, et al.*, 110 F.3d at 155; *Petition of Eastern* at A-9. (Nor will any such successor relationship ultimately support an indemnification or other claim of Eastern against the Peabody Respondents).

In addition to the fact, recognized by the First Circuit, that a proper interpretation of the Coal Act supports the assignment of the Easts to Eastern, it is also notable that virtually all of the evidence cited by Eastern to support its "successor" claim comes from statements of Eastern, or from statements made by EACC during the time that it was owned and controlled by Eastern. JA 2113-2115; *Id.* at ¶¶ 14, 16-18. It is undisputed

that from 1963 to 1987, EACC was a wholly-owned subsidiary of Eastern or one of Eastern's other wholly-owned subsidiaries. As such, Eastern controlled EACC and had the power to direct EACC to make statements and representations concerning its alleged status as successor.

Eastern also controlled EACC's Board of Directors. For example, in 1967 Eastern's President, Eli Goldston, was Chairman of the Board of Directors of EACC. JA 276. Eastern's Senior Vice President-Administration and Finance, J.N. Philips, was Vice Chairman of the Board of Directors of EACC. *Id.* EACC's President, A.P. Boxley, was also Senior Vice President of Eastern. *Id.* Given these facts, and others, it is obvious that Eastern directed the statements made and positions taken by EACC on all issues, including the statements upon which Eastern relies to claim that EACC is the successor to Eastern's Coal Act liability.

D. *EACC Has Been Assigned Its Own Retirees And Beneficiaries.*

It should also be noted that pursuant to the Coal Act, EACC itself has been assigned its own retirees and their dependents. As of October 1, 1994, the SSA had assigned 1,860 beneficiaries to EACC. JA 2112-2113 at ¶ 9. Between October 1, 1994, and September 30, 1995, EACC paid premiums to the Combined Benefit Fund pursuant to the Coal Act of more than $4,000,000.00. *Id.* Among these assignees to EACC are employees who formerly worked for Eastern and then worked for EACC, unlike Mr. East and the others assigned to Eastern who are at issue in this action, who never worked for EACC. *Id.* at ¶ 10.

E. *Other Coal Act Decisions.*

In Eastern's final section of its Statement of the Case, it cites to three other cases which have been denied certiorari before this Court. *See Blue Diamond Coal Co.* v. *Secretary of Health and Human Services (In re Blue Diamond Coal Co.)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co.* v. *Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). Eastern attempts, however, to distinguish these cases from the case at bar by asserting that none of these cases involved a situation similar to Eastern's in that in these cases, the companies challenging the Coal Act left the coal industry without making any provision for the continued contributions to the UMWA. *Petition of Eastern* at 11. However, even if this fact is true, it is irrelevant given that the decisions cited did not rely on whether or not these companies had made such provisions. To the contrary, each of these decisions considered essentially the same arguments proffered by Eastern here and reached the same conclusion as the First Circuit, *i.e.*, that the Coal Act, as it was applied to each of the companies, did not violate the Due Process and the Takings Clauses of the Constitution.

The fact remains that the Second, Sixth and Seventh Circuit Courts have all considered, and affirmed, the constitutionality of the Coal Act. As the First Circuit's decision challenged here, is, in fact, consistent with these three other circuits, there is no reason for any further appellate review.

REASONS FOR DENYING THE WRIT

I. THE FIRST CIRCUIT CORRECTLY DETERMINED THAT EASTERN MISCONSTRUES THE COAL ACT WHEN IT CLAIMS THAT IT IS UNFAIRLY BURDENED BY THE ACT.

Eastern erroneously argues in its Petition that, as a former coal industry participant, the retroactive cost-spreading of the Coal Act is unnecessarily burdensome. Eastern's reasoning is that a former participant, like Eastern, is not responsible for creating the financial crises that inspired the legislation because Eastern "took the prudent step of creating a substitute," *i.e.*, a successor which maintained a financial commitment to its miners. *Petition of Eastern* at Section I-B, 16-19, & Section I-C, 19-21. Eastern seeks to support its Petition for a Writ of Certiorari on the illusory building block that a "successor" relationship between Eastern and EACC is relevant to the assignment of beneficiaries who never worked for EACC. Thus, according to Eastern, EACC and the other Peabody Respondents somehow became obligated under the Coal Act for Mr. East, and the other employees like him, who never even worked for EACC. This argument was vehemently rejected by the First Circuit:

> There are two gaping flaws in the fabric of Eastern's analysis. In the first place, it is not accurate to claim that only those [signatory operators] which executed NBCWAs in or after 1974 created a legitimate expectation of lifetime health benefits for miners. Congress and the Coal Commission both reviewed the historical evidence and concluded that pre-1974 signatories had made an implicit commitment to furnish such benefits [cites omitted]. Since

> Eastern as a signatory of the earlier NBCWAs, contributed directly to mine workers' legitimate expectations of lifetime health benefits, requiring it to pay for the realization of those expectations is hardly irrational. . . .
>
> The second hole in [Eastern's] argument is even more ringent. Eastern insists that the Coal Act was a bail-out of the benefit plans, pure and simple; that it did not contribute to the funding shortfalls which necessitated the bail-out; and, thus, that holding it liable under the Act is bizarre. But this is much too crabbed a view of the historical record. The crisis in retiree benefits occurred in two stages: first, the inculcation of an expectation of lifetime health benefits; and second, the inadequacy of the initial method chosen by the parties (through negotiation, albeit with government intervention) to respond to this expectation. Both elements were necessary in order to forge the problem which Congress eventually addressed. If the expectations had not been created by Eastern and its counterparts, the need for the later plans, and eventually for the Combined Fund, would never have arisen. Thus, it is disingenuous for Eastern to focus solely on its lack of involvement in more recent benefit plans while ignoring its role in the events leading to their establishment.

Eastern v. *Chater, et al.*, 110 F.3d at 157-58; *Petition of Eastern* at A-13 through A-15.

The First Circuit held that the statute itself does not permit an assignment to any purported "true successor," contrary to the contention of Eastern. The First Circuit's characterization of Eastern's argument and the Court's response to that argument is as follows:

> Because section 9706(a) [of the Coal Act] is silent on the question of successor liability, Eastern's thesis runs, the law is ambiguous and the SSA ought to have filled the resultant vacuum in such a way as to have dictated assignment of the Easts to EACC. . . . [However,] [s]ection 9706(a) of the Coal Act unambiguously delineates a classification regime — and that regime, literally applied, requires East's assignment to the appellant as the pre-1978 signatory which employed him for the longest interval . . . Eastern's claim that Congress overlooked the possibility of assignment to successors of a [signatory operator] is unpersuasive. . . . [R]eviewing the language and architecture of the Coal Act as a whole . . . we think it is obvious that Congress purposely omitted any reference to successors in writing section 9706(a)'s assignment scheme. *See generally Passamaquoddy Tribe* v. *State of Me.*, 75 F.3d 784, 794 n.6 (1st Cir. 1996)(rejecting idea that statutory silence necessarily indicates ambiguity; in an appropriate context, failure to mention an item demonstrates specific congressional intent). [Thus,] the Easts were properly assigned by the SSA in pursuance of the plain terms of the Coal Act.

Eastern v. Chater, et al., 110 F.3d at 154-55; *Petition of Eastern* at A-7 through A-9.

Even if Eastern had "bargained out" of certain of its obligations with respect to its mining operations (which it did not do in any event with respect to the obligations in question), "Congress reasoned that an equitable solution would permit reaching back to place responsibility on those companies which the miners had worked for, notwithstanding their bargaining out of their obligations." *Carbon Fuel Company* v. *USX Corporation*, 100 F.3d 1124, 1133 (4th Cir. 1996). With the Coal Act:

> Congress has chosen to spread the costs of the Combined Fund's benefits to those employers who had profited from the labor of UMWA miners and who, at some time in their histories, had contributed to multi-employer welfare benefit funds.

In re: Blue Diamond Coal Co., (Blue Diamond Coal Co. v. *Shalala)*, 174 B.R. 722, 727 (E.D. Tenn. 1994).

Congress' "express intent" was "that responsibility for financing the cost of providing health benefits to eligible retirees should be placed on those companies which employed [them] and thereby benefited from their services." *Holland* v. *Keenan Trucking Co.*, (S.D. W.Va., slip op., March 15, 1995), at 5, *citing* 138 Cong. Rec. at S17603 (daily ed. Oct. 8, 1992).

Thus, as the First Circuit affirmed, the SSA's assignment of Mr. East to Eastern rather than to EACC is wholly consistent with the intent of the Coal Act. Mr. East worked for Eastern, as noted by First Circuit, for 14 years. Eastern obtained the benefit of all of those years of labor. Mr. East did not work for EACC at any time and EACC obtained no benefits from his work. The profits generated by Mr. East went into the

coffers of Eastern before EACC even came into existence. Moreover, as the First Circuit observed, Mr. East

> was in Eastern's employ during a 14-year period in which he developed a reasonable expectation of lifetime health benefits. In contrast, he never worked for EACC, yet Eastern's alternative would have that company assume responsibility for him. Requiring Eastern to pick up the tab strikes us as a less arbitrary step.

Eastern v. Chater, et al., 110 F.3d at 158 n.5; *Petition of Eastern* at A-16 n.5.

Congress clearly intended that assignments be made to the employer for whom the retiree worked longest, since that employer obtained the greatest benefit from the retiree's labors. As the company which employed him for the longest period and benefited most from his labor, it is surely Eastern, and not EACC, which Congress intended to make responsible for the benefits received by Mr. East and his dependents.

Eastern argues that because it was replaced in the coal business by EACC, which took over its ongoing responsibilities under the then-existing UMWA funds, it was not one of those companies which primarily caused the crisis by creating "orphan" retirees. *Petition of Eastern* at 18-19. But in *Carbon Fuel*, the Court also dealt with companies which had others take over their responsibilities under the existing UMWA agreements. The Fourth Circuit in *Carbon Fuel* found that, in fact, "those companies that bargained out of their obligations and left the mining business, helped, in part, to cause near financial collapse of the Benefit Plans by causing a small number of signatory companies to bear the entire burden." *Carbon Fuel Company* v. *USX Corporation*,

100 F.3d. at 1133. The Fourth Circuit found that Congress had, therefore, reasoned that it would be equitable to reach back to those companies the miners had worked for, notwithstanding their bargaining out of their obligations under the then existing UMWA Funds. *Id.*

The Fourth Circuit in *Carbon Fuel* also directly answers Eastern's plea for relief from the statute because of the "practical importance" to Eastern in its having raised funds on the assumption that it had no further coal-related liabilities.

The Fourth Circuit held:

> All economic legislation can be said to upset settled economic expectations of someone. "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S. Ct. 2882, 49 L.Ed.2d 752 (1976). That principle holds true "even though the effect of the legislation is to impose a new duty or liability based on past acts."

Carbon Fuel Company v. *USX Corporation*, 100 F.3d at 1137.

Thus, Congress very clearly intended that Eastern would be responsible under the Coal Act for the premiums for Mr. East and the others who worked for it and from whom it benefited, notwithstanding the purported expectations of Eastern and the other "reachback" companies that they would not have such responsibilities.

CONCLUSION

For all of the foregoing reasons, Respondents and Third-Party Defendants, Peabody Holding Company, Inc., Eastern

Associated Coal Corp. and Coal Properties Corp. respectfully request that Eastern's Petition for Certiorari be denied.

Respectfully submitted,

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